

(2010) 10 MAD CK 0413

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2372 of 2010

Annapoorna Re-rolling (P) Ltd.

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal
South Regional Bench and The Commissioner of Central
Excise Chennai II Commissionerate

RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F

Citation : (2010) 259 ELT 353 : (2011) 22 STR 481

Hon'ble Judges : M.M. Sundresh, J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : K. Jayachandran, for the Appellant; K. Ravichandrababu, SCGSC for R2, for the Respondent

Final Decision : Allowed

Judgement

M.M. Sundresh, J.—The Assessee has come up on appeal challenging the order of the Tribunal passed in Appeal No. E/489/09 dated 27.07.2010, wherein the appeal filed by the department was allowed and the matter was remitted back to the Commissioner of Central Excise (Appeals) for fresh adjudication, by raising the following substantial questions of law:

1. Whether the Tribunal is justified in remanding the matter on the ground that the Commissioner of Central Excise (Appeals) was not correct in passing the final order in the appeal on merits without mentioning about the waiver of pre-deposit of amounts u/s 35-F of the Act?
2. Whether the Tribunal is right in remanding the matter directing the first appellate authority to pass orders in terms of Section 35-F of the Act, when the first appellate authority passed orders on merits relying on the decision of the Hon'ble Supreme Court?
3. Whether the Tribunal is empowered to remit the matter to the lower authority

except on the issue on merits?

4. Whether the absence of an order u/s 35-F of the Act, being technical in nature, is fatal to the orders passed on merits?

5. Whether the Tribunal is right in remanding the appeal in entirety excluding the period for which no appeal was filed by the Department before the Tribunal?

6. Whether the absence of an order u/s 35-F be presumed to be made when the appeal itself was taken up and decided on merits following the decisions of the Hon"ble Supreme Court?

2. The brief facts of the case are as follows:

The Appellant/assessee has been engaged in the manufacture of MS rounds/CTD bars, MS flats and MS angles. During the years 2004-2005 and 2005-2006, the Assessee availed exemption under Notification No. 8/2003 dated 01.03.2003. After crossing the exemption limit as per the Notification, the Assessee paid the duty after availing CENVAT credit on the goods. The department issued two show cause notices for the above said two years proposing to demand duty with interest towards CENVAT credit, which is liable to be reversed. After considering the reply given by the Assessee, the Additional Commissioner of Central Excise affirmed the proposal in and by his order dated 03.07.2007.

3. An appeal was filed by the Assessee before the Commissioner of Central Excise (Appeals). While preferring the appeal, the Assessee filed an application seeking waiver of the pre-deposit. Thereafter, the appeal was allowed on merits by relying upon the judgments rendered by the Tribunal on earlier occasions.

4. Challenging the same, the department preferred a further appeal to the Tribunal and the Tribunal has set aside the order of the Commissioner of Central (Excise) Appeals and remitted the matter back for re-consideration on the ground that the appeal made before the Commissioner of Central Excise (Appeals) is not maintainable being in violation of Section 35-F of the Central Excise Act, 1944, as there was no pre-deposit made by the Assessee. Challenging the same, the Assessee has filed the present appeal.

5. It is not in dispute that the Assessee filed an application seeking to waive the pre-deposit. It is also not in dispute that the department, in spite of service of notice and sufficient time given, had not chosen either to contest the application seeking to waive pre-deposit or the appeals. Thereafter, the Commissioner of Central Excise (Appeals) has allowed the appeal on merits.

6. Insofar as the order passed for the year 2004-2005, the department has not chosen to file an appeal, but however has filed an appeal for the year 2005-2006 alone. It is further seen from the records that even in the grounds of appeal filed before the Tribunal, no plea has been taken on the ground that no proper notice has been served on the department and the appeal is not maintainable before the Commissioner of Central Excise (Appeals) while deciding the same on merits,

without complying with the condition of pre-deposit. Only during the course of arguments, those points were made by the department's representative stating that inasmuch as the Commissioner of Central Excise (Appeals) has not decided the issue on pre-deposit, he ought not to have passed the order on merits. Accepting the said contention, the appeal was allowed by remanding the matter back to the Commissioner of Central Excise (Appeals).

7. It is true no doubt that Section 35-F of the Act, mandates that for adjudication the appeal on merits, there has to be pre-deposit by the Assessee concerned. However, the proviso to Section 35-F clearly states that in a given case, the Commissioner of Appeals or the Appellate Tribunal as the case may be, may dispense with such deposit. In view of the fact that the department has not chosen to contest the application filed for pre-deposit, the Commissioner of Central Excise (Appeals) has proceeded to decide the matter on merits. Even while deciding the appeal on merits, the department has not chosen to contest the same. Thereafter, the appeal was filed before the Tribunal challenging the order on merits. Therefore, the above said facts would indicate that it is not open to the department to contend before the Tribunal for the first time during the arguments that inasmuch as the question of pre-deposit having not been considered by the Commissioner of Central Excise (Appeals), the appeal before the said authority was not maintainable on merits.

8. As discussed above, the Assessee cannot be faulted for not deciding the application filed for waiver of pre-deposit. The Assessee duly filed the application setting out the reasons for waiver of pre-deposit. Admittedly, the said application was not contested by the department and that is the reason why the Commissioner of Central Excise (Appeals) decided the matter on merits. Even while deciding the appeal on merits, the department has not chosen to appear and raise any objection. Further, while filing an appeal before the Tribunal on merits, no ground has been taken that the department was not heard and the non-compliance of pre-deposit, which resulted due to the failure of the Commissioner of Central Excise (Appeals) in deciding the said application filed for waiver, would require the appeal deciding on merits as finality. A further reading of Section 35-F of the Act, would show that a discretion is given to the authorities to waive the condition of pre-deposit. The object of the said condition is to put the Assessee, who files the appeal, on terms in the event of his appeal being dismissed.

9. In the present case on hand, the facts would clearly indicate that the final order on merits has been passed against which an appeal was preferred by the department to the Tribunal. We are of the opinion that the Tribunal has committed an error in remanding the matter to the Commissioner of Central Excise (Appeals) to decide the matter afresh. When an appeal has been filed on merits, challenging the decision made by the Commissioner of Central Excise (Appeals), the same has to be decided on merits. Admittedly the appeal has been preferred by the department against the order which ends in favour of the

Assessee. Such an order cannot be set aside on extraneous grounds than on merits, especially when no plea has been taken on the ground of maintainability. Further, the proviso to Section 35-F of the Act, gives ample power to the Commissioner of Central Excise and to the Appellate Tribunal to waive the pre-deposit. When such a power is given enabling an applicant to prefer appeal to the Tribunal, nothing prevents the Tribunal from excising such power in favour of the Assessee concerned, more so, when he is armed with an order passed by the Commissioner of Central Excise (Appeals).

10. Therefore, considering the above said facts and on consideration of Section 35-F of the Act, we are of the considered opinion that the order of the Tribunal cannot be sustained. Accordingly, the order passed by the Tribunal is set aside and the Tribunal is directed to decide the appeal on merits and in accordance with law. The substantial questions of law raised are answered in favour of the Assessee and the appeal is allowed. There will be no order as to costs. Consequently, M.P. No. 1 of 2010 is closed.